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No. 00-457

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY,

Petitioner,

v.

WILLIAM A. MILLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

The question presented by the Petition is whether Respondent, an insurance sales agent who signed a "Form U-4" containing an agreement to arbitrate disputes with members of the National Association of Securities Dealers ("NASD"), is required to arbitrate a dispute he has with his former employer, an insurance company which is an NASD member. The Petition principally asserts that the decision of the Alabama Supreme Court in this case is at variance with the decisions of four federal circuit courts of appeal.

The facts of this case indisputably show that Respondent sold only insurance policies on behalf of Petitioner. The facts of this case indisputably show that Respondent never sold any securities on behalf of Petitioner. Respondent's complaint in this case alleges breach of contract, fraud and other misconduct that arose out of the Respondent's involvement with the "insurance business" of Petitioner.

Simply put, the facts contained in the record evidence do not raise the question as framed in the Petition.

Because the Alabama Supreme Court's ruling is factually distinguishable, it does not conflict with the federal circuit court decisions and other opinions cited by Petitioner. The Alabama Supreme Court's decision was proper in all respects and does not call for a review by this Court. Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The trial court's order denying Petitioner's motion to compel arbitration of Respondent's claims succinctly and correctly found: "It does not appear that the sale of securities is involved in this case." That factual finding is the bedrock of the trial court's ruling and the Alabama Supreme Court's subsequent affirmance. Applying its earlier decision in *Ex parte Hagan*, 721 So. 2d 167 (Ala. 1998), *cert. dismissed*, 525 U.S. 1119, 119 S. Ct. 921, 142 L. Ed. 2d 899 (1999), the Alabama Supreme Court ruled that the trial court's decision was not clearly erroneous and affirmed the denial of Petitioner's motion to compel arbitration.

Respondent wishes to make clear that his complaint in this case makes no claims arising from employment termination, employment discrimination or similar "employment-related" causes of action. Rather, Respondent alleges that Petitioner and another defendant below, Nowlin & Associates: (1) misrepresented material facts to Respondent and breached their contract with Respondent concerning the insurance policies Respondent sold and the commissions Respondent was due to receive from the sales of those insurance policies; (2) deceived Respondent concerning those insurance policies and commissions; (3) suppressed material facts from Respondent concerning those insurance policies and commissions; (4) negligently, recklessly, wantonly and/or wrongfully misrepresented material facts to Respondent concerning those insurance policies and commissions; and (5) fraudulently deceived Respondent concerning those insurance policies and commissions.

In his complaint, Respondent stated: he began an agent relationship with Petitioner and Nowlin & Associates to sell variable rate products, including but not limited to a Payroll Exceptional Life ("PEL") insurance product; he became a top sales producer with the PEL product; the PEL product is a life insurance policy and not a security; he was strongly encouraged to sell PELs; and he was assured that he would be compensated based on his production, including continued commissions and vesting. After September 1995, when the PEL block of business consisting of thousands of life insurance policies was sold to another company, Respondent claims he lost customers, commissions and his vesting as a result of that block sale. Respondent claims that Petitioner and Nowlin & Associates falsely represented to him that the PEL customers were his clients, would continue to be his clients and that Respondent would continue to receive commissions, income and similar vested benefits. Respondent claims he was caused to sustain substantial compensatory damages and great mental anguish as a result of the wrongful conduct of Petitioner and Nowlin & Associates.

In his affidavit presented to the trial court, Respondent averred in pertinent part that: in October 1983 he entered into a "Career Agent's Agreement" with State Mutual Life Assurance Company of America (Petitioner's predecessor) through the office of Nowlin & Associates; in June 1984 he signed a "Form U-4" with State Mutual through Nowlin & Associates; he has personal knowledge of the methods by which Petitioner markets its insurance products; he has personal knowledge of the PEL products marketed by State Mutual which are the subject of this civil action; all of the policies sold under the PEL program were individual universal life insurance policies sold by State Mutual to

groups of employees; the PEL life insurance products are not and never have been registered securities of any sort; his lawsuit arises from misrepresentations made and actions taken by Petitioner and Nowlin & Associates in connection with the marketing of and servicing of insurance policies; no employment action was taken against him by Petitioner or Nowlin & Associates; he voluntarily terminated his employment and association with Petitioner and Nowlin & Associates on June 15, 1997; no wrongful discharge dispute has arisen out of the termination of his employment and association with Petitioner and Nowlin & Associates; and he has made no claims of any wrongful discharge.

Respondent further averred that, when he signed the "Form U-4," he was not aware that he was waiving any of his rights and he had no intention of waiving any of his rights to seek redress in the courts of Alabama in connection with disputes relating to his sales of insurance products.

Respondent had been employed as an insurance sales agent for some eight months when he was asked to sign the "Form U-4" ***so that he might be registered to sell securities for Petitioner in the future — a contingency that never occurred.***

On the last page of the "Form U-4" signed by Respondent, a paragraph appearing above the signature box reads as follows:

> 5. I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, **that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register**, ***as indicated in Question 8.***

(emphasis added.)

The only box checked in the "Question 8" referenced in the "Form U-4" that Respondent signed is a box indicating "NASD," the National Association of Securities Dealers.

Rule 10101, contained in the NASD Manual, sets out "Matters Eligible for Submission" to arbitration. Rule 10101 reads:

> This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(3) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, ***with the exception of disputes involving the insurance business of any member which is also an insurance company***:
>
> (a) between or among members;
>
> (b) between or among members and associated persons;
>
> (c) between or among members or associated persons and public customers, or others; and
>
> (d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and

> participants, pledgees, or other persons using the facilities of a registered clearing agency, as those terms are defined under the rules of such a registered clearing agency.

(emphasis added.)

A copy of a portion of a document filed by NASD with the Securities and Exchange Commission, pertaining to a "proposed rule change" approved by NASD's Board of Governors on July 13, 1979, was submitted to the trial court by Respondent. That document, in part, contains NASD's representations to the Securities and Exchange Commission concerning proposed changes to the NASD's "Code of Arbitration Procedure." Under the heading entitled "Purpose of Proposed Rule Change," the NASD document reads in part as follows:

> [T]he Association has added an exception which would exclude from arbitration "disputes involving the insurance business of any member which is also an insurance company." ***The Association based its determination to exclude such disputes on its belief that the number of insurance-only claims involving insurance companies is so disproportionately large in relation to their securities business that to include such claims would unduly burden the arbitration system. In addition, the inclusion of such claims could result in a requirement to arbitrate matters that are intrinsically insurance, that is, matters with respect to which the Association does not believe it should mandate arbitration.***

(emphasis added.)

Neither the "agent's agreement" entered into between Respondent and State Mutual nor the "agent's agreement" entered into between Respondent and SMA Life Assurance Company contains an arbitration provision.

There is no allegation in Respondent's complaint that he was caused any injury arising from any transaction which was concerned with or related to any registered securities. There is no allegation in Respondent's complaint that is referable to any injury arising from any transaction that was concerned with any aspect of the Petitioner's business other than its insurance business.

Petitioner did not dispute in the proceedings below the assertion of Respondent in his affidavit that "[t]he PEL life insurance products are not and never have been registered securities of any sort." Petitioner did not dispute in the proceedings below that it is an insurance company.

SUMMARY OF THE ARGUMENT

Petitioner argues that the decision of the Alabama Supreme Court in this case: (1) conflicts with the decisions of four federal circuit courts of appeals; (2) conflicts with the policies behind the Federal Arbitration Act; (3) will cause different outcomes in similar cases; and (4) is contrary to the language and history of the NASD Code.

As reasons for denying certiorari review, Respondent contends that the Alabama Supreme Court's decision in this case: (1) is readily distinguishable on its facts from the decisions of the federal circuit courts cited by Petitioner; (2) comports with and advances a fundamental policy of the Federal Arbitration Act, *viz.*, that parties are bound to

arbitrate only those claims that they mutually agree by contract to arbitrate; (3) will not generate different outcomes, on similar facts, in any other cases; and (4) closely follows NASD's own public explanation of the "insurance business" exception to NASD Rule 10101.

ARGUMENT

The Alabama Supreme Court's decisions in this case and in *Hagan* are not as aberrant as Petitioner invites the Court to believe. Petitioner's "four circuits" argument fails due to conspicuous factual distinctions. Petitioner cites as authority for its argument the decisions in *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *In re Prudential Ins. Co. of Am. Sales Pract. Litig.*, 133 F.3d 225 (3d Cir. 1998), *cert. denied,* 525 U.S. 817, 119 S. Ct. 55, 142 L. Ed. 2d 43 (1998); *Armijo v. Prudential Ins. Co. of Am.*, 72 F.3d 793 (10th Cir. 1995); and *Kidd v. Equitable Life Assur. Soc. of U.S.*, 32 F.3d 516 (11th Cir. 1994), *app. after remand*, 199 F.3d 11 (11th Cir. 1997), *cert. denied,* 522 U.S. 1028, 118 S. Ct. 626, 139 L. Ed. 2d 606 (1997). (Petitioner also cites *Metropolitan Life Ins. Co. v. McRae*, 121 F.3d 723 [TABLE, unpublished opinion] (11th Cir. 1997), but 11th Cir. R. 36-2 states that "[u]npublished opinions are not considered binding precedent.")

The second sentence of the *Mouton* opinion stated: "[This case] requires us to decide whether a securities dealer who agreed to arbitrate 'any dispute, claim or controversy that may arise between [himself] and [his] firm' is compelled to arbitrate his Title VII discrimination claim against his employer." 147 F.3d at 454. *Mouton* also noted that the plaintiff was "a seller of mutual funds [who] was required to be licensed by the NASD." *Id.* The *Mouton* opinion held

that "illegal employment discrimination, if it exists, involves an employer's statutory obligations as an employer rather than as an insurer." 147 F.3d at 457.

Unlike the plaintiff in *Mouton*, the facts of the present case show that: (1) Respondent was not "a securities dealer" for Petitioner; (2) Respondent has not made an "employment discrimination" claim against Petitioner; and (3) Respondent was not "required to be licensed by the NASD" in order to sell insurance policies for Petitioner.

The plaintiffs in *In re Prudential* alleged that their former employer "took adverse employment action against them in alleged retaliation for their refusal to participate in the company's insurance sales fraud." 133 F.3d at 227. That opinion further noted: "No party contests the employment nature of the plaintiffs' claims." 133 F.3d at 231.

Distinguishing *In re Prudential* from the present case are the facts that: (1) Respondent does not allege that Petitioner took any "adverse employment action" against him; and (2) Respondent continually and vigorously throughout the proceedings has disputed that his claims are of an "employment nature."

The plaintiffs in *Armijo* presented only "federal and state discrimination claims" after their employment was terminated by their employer. 72 F.3d at 795. The opinion in *Armijo* is peppered with facts disclosing that the plaintiffs in that case "also sold mutual funds," 72 F.3d at 795, "engage[d] in the securities business under the control of Prudential," 72 F.3d at 799, and "each concede[d] in affidavits that they sold mutual funds," 72 F.3d at 799 & n.7.

The facts of the present case are distinguishable from the facts in *Armijo*, in that: (1) Respondent has not made any discrimination claim against Petitioner; (2) Petitioner did not terminate Respondent's employment; and (3) Respondent never sold any securities or engaged in the securities business of Petitioner.

Kidd involved complaints of "race discrimination in violation of Title VII of the Civil Rights Act of 1964," 32 F.3d at 518, brought by two plaintiffs who were "present and former securities sales agents" of the defendant, 32 F.3d at 517.

The record evidence in the present action distinguishes *Kidd*, in that Respondent: (1) has made no federal employment-discrimination claims; and (2) sold no securities for Petitioner.

Aside from those factual distinctions, the record evidence in this case implicates a cardinal policy of the Federal Arbitration Act, which is that parties cannot be compelled to arbitrate any disputes they did not agree to arbitrate. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985 (1995) (citations omitted).

> "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." [. . .] This axiom recognizes the fact that arbitrators derive their authority to resolve

> disputes only because the parties have agreed in advance to submit such grievances to arbitration.
>
> *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986) (citations omitted).

The Court has recognized that the Federal Arbitration Act does not "prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L. Ed. 2d 488 (1989). Applying *Volt*, the Fifth Circuit observed that "the policy favoring arbitration embodied in the Federal Arbitration Act cannot trump the express agreement of the parties to exclude matters from arbitration." *Catholic Diocese of Brownsville v. A. G. Edwards & Sons, Inc.*, 919 F. 2d 1054, 1056-57 (5th Cir. 1990), *also citing Moses H. Cone Memorial Hosp. v. Mercury Const. Co.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983).

The arbitration agreement entered into by Petitioner and Respondent that is at issue in this case incorporated the "insurance business" exception. Petitioner may not invoke the Federal Arbitration Act so as to "trump" its express agreement with Respondent that excludes from arbitration any claims arising between them that relate to the insurance business of Petitioner.

The Eleventh Circuit articulated that "[t]he federal policy towards a very liberal construction of the Arbitration Act does not permit a court to ignore the precise language of an agreement." *Storer v. Miller*, 914 F.2d 215, 219 (11th Cir. 1990). The *Storer* decision, which construed language in an

agreement that specifically excluded from arbitration certain types of claims, followed the Ninth Circuit's holding in *Van Ness Town Houses v. Mar Industries Corp.*, 862 F.2d 754, 757 (9th Cir. 1988), which said: "Because the parties did not actually agree to arbitrate their securities claims, the policy favoring arbitration does not, by itself, support the district court's order compelling arbitration."

In the present case, the parties did not actually agree to arbitrate any claims that arose out of Petitioner's insurance business, which is all that Respondent's complaint implicates. The policy favoring arbitration does not override the parties' contractual agreement here, either.

There is no record evidence suggesting that Respondent agreed to arbitrate any dispute he had with Respondent arising out of Respondent's sale of any insurance products on behalf of Petitioner. In fact, the "Form U-4" incorporated by reference the "insurance business" exception contained in the revised NASD Code provisions. Respondent's affidavit provides abundantly clear record evidence of his intention at the time he signed the "Form U-4." At that time he did ***not*** intend to arbitrate any "insurance policy" disputes.

"We have previously held that the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 115 S. Ct. 1212, 1216, 131 L. Ed. 2d 76 (1995), *citing Volt Information Sciences.*

The Alabama Supreme Court's *Hagan* decision observed:

> [T]he fact that Hagan may also have been entitled to sell some form of "securities" that were not within the "insurance business" of MIMLIC does not undermine this Court's conclusion that the disputes set forth in Hagan's complaint involve the insurance business of the defendants within the meaning of § 10101.

721 So. 2d at 170 & n.1.

The undisputed record evidence in the present case shows that the PEL products over which Respondent's lawsuit arose were insurance policies and never were registered securities. As was the case in *Hagan*, the fact that Respondent ***may*** have been "entitled to sell some form of 'securities' " does not undermine the trial court's conclusion and the Alabama Supreme Court's subsequent determination that the disputes set out in Respondent's complaint "involve the insurance business" of Petitioner within the ambit of the exception set out in NASD Rule 10101. Respondent signed the "Form U-4" in the event he should be called upon to sell registered securities — a contingency that never occurred. Respondent's complaint in no way implicates the securities business of Petitioner.

Based upon the record evidence, the trial court correctly found that Respondent did not agree to submit to arbitration his insurance-policy disputes with Petitioner. The Alabama Supreme Court correctly determined that the trial court's ruling was not clearly erroneous and affirmed.

Because its decision was so fact-driven, the Alabama Supreme Court's decision in this case should not generate any substantially different outcomes in cases whose facts are similar. But, it should be the rare case indeed where the record evidence similarly presents the circumstances of an insurance sales agent who never sold any securities of any sort and whose complaint raises no employment-related claims and whose employer seeks to compel arbitration under the NASD Code.

Finally, a separate and sound basis for denying review of the Alabama Supreme Court's decision in this case is that NASD itself — in its written submission to the Securities and Exchange Commission — explained that its reason for proposing the "insurance exception provision" to Rule 10101 was that insurance-only claims were imposing an undue burden on NASD's arbitration system. This stark record evidence quickly disposes of Petitioner's argument that the Alabama Supreme Court's decision in this case is "contrary to the language and drafting history of the NASD Code." (Brief of Petitioner at 10-11.)

If the NASD Code's "language and history" says anything at all, it says that NASD's arbitration machinery was becoming overloaded with non-securities, insurance-related claims and NASD told the Securities and Exchange Commission that NASD wished to shed itself of claims that "would unduly burden the arbitration system." Language rarely is that plain and history infrequently is so clear.

The Second Circuit, in *Thomas James Associates, Inc. v. Jameson*, 102 F.3d 60, 64 (2d Cir. 1996), made the following observation:

> We cannot fathom any possible reason why the NASD would except insurance business disputes from arbitration, but then only when those disputes involved certain parties. Rather, the NASD probably meant to exempt "any dispute involving the insurance business of an insurance company member from compulsory arbitration, not just those involving specific classes of individuals."

(citations omitted).

If NASD's "insurance business" exception cannot apply to the facts of this particular case, the exception could not apply to any set of facts. Petitioner's absurd argument would reduce that exception to a useless appendage.

The NASD arbitral regimen was never intended to apply to the circumstances presented by the facts of this case. Petitioner's figure-eight argument does not overcome the conclusion that Respondent's claims cannot be compelled to arbitration. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Information Sciences*, 489 U.S. at 478, 109 S. Ct. at 1256. Because Petitioner seeks coercion in lieu of contractual compliance, the Petition is due to be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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